Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, and VERNIE RHODES, JR.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, preempts a state law claim that former employees were fraudulently induced to enter into an ERISA-qualified severance plan where, although the state law is a law of general application, liability under that state law depends upon the ERISA plan.

PARTIES TO THE PROCEEDING AND RULE 29.1 LIST

All parties to the proceeding below are reflected in the case caption. Petitioner Sears, Roebuck and Co. is incorrectly denominated as "Sears Roebuck & Company" in the court orders and opinions below. Petitioner has no parent companies or nonwholly-owned subsidiaries to list pursuant to Rule 29.1.

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In The

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SEARS, ROEBUCK AND CO.,

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v.

VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, and VERNIE RHODES, JR.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sears, Roebuck and Co. ("Sears") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on September 2, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 30 F.3d 1402. App. 1-12.[1] The District Court's memorandum opinion granting Sears' motion for summary judgment is not reported. App. 23-27. The prior opinion of the Court of Appeals is reported at 958 F.2d 1036. App. 32-49.

JURISDICTION

The judgment of the Court of Appeals was entered on September 2, 1994. App. 13. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The ERISA provision involved in this case is Section 514(a), 29 U.S.C. § 1144(a), which provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

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[1] References to the Appendix filed with this Petition will be abbreviated as "App." followed by the page numbers. References to the record in the court below will be abbreviated as "R1" or "Rec. Ex." followed by the docket or item number.

STATEMENT OF THE CASE

Sears is a nationwide employer. In the fall of 1989, Sears restructured its delivery facilities across the country. As part of that national restructuring program, Sears offered all affected employees, including the plaintiffs, who were then employed at a Sears distribution center in Birmingham, Alabama, a standard Unit Closing Severance Allowance Plan ("the severance plan"). App. 2-3; R1-54. The severance plan provided enhanced severance benefits as an incentive for employees to terminate employment. The severance plan was an employee welfare benefit plan covered by ERISA. App. 26; R1-87-Ex. B. As a condition precedent to receipt of plan benefits, employees had to sign a release and resign or retire from employment at Sears. The plaintiffs, who were at will employees, agreed to do so. They accepted the severance plan, resigned employment, and, in exchange for enhanced severance benefits, released Sears from all suits or claims. App. 3; R1-54; R1-87-Ex. B-1.

Plaintiffs brought this lawsuit asserting, *inter alia*, an Alabama state law claim for fraud. Plaintiffs alleged that Sears' misrepresentations induced them to accept the severance plan, terminate employment and forego greater retirement benefits. R1-10. Plaintiffs further alleged that Sears improperly failed to inform them of their right to consult a lawyer and afford them at least 10 days before requiring acceptance of the severance plan and accompanying release. *Id.* Plaintiffs seek to recover their alleged foregone ERISA benefits as damages and, in the event damages are awarded, the plaintiffs have offered to offset the benefits they have already received under the severance plan. *Id.*

The court below frequently characterized this case as one where Sears' alleged "fraud concern[ed] the elimination of the plaintiffs' jobs" (App. 9; 30 F.3d at 1406); "[t]he crux of the plaintiffs' complaint is the fraudulent inducement to resign based on the closing of the facility." App. 4; 30 F.3d at 1404. While the plaintiffs' fraud claim certainly also asserts misrepresentations concerning the closing of the Birmingham facility, as well as alleged misrepresentations about the plan and its accompanying releases, the facility closing statements alone do not provide the necessary legal foundation for a fraud cause of action. In its initial decision in this case, *Forbus v. Sears Roebuck & Company*, 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 412 (1992) ("*Forbus I*"), the Court of Appeals recognized that the essential element of the plaintiffs' fraud claim is the severance plan, the "new arrangement . . . in which Sears agreed to provide enhanced severance benefits in return for the [plaintiffs'] agreement to execute releases and waivers." App. 44; 958 F.2d at 1042. Without that "supplemental contract," the employment at will doctrine would have been dispositive of the fraud count. *Id.* Accordingly, it is the plaintiffs' claim that they "were fraudulently induced to enter into" the severance plan "about which [the plaintiffs] claim that misrepresentations were made and facts suppressed" which *Forbus I* found to constitute the linchpin of the fraud action. *Id.* Without the severance plan, there could be no liability under Alabama law.

After *Forbus I*, Sears moved for partial summary judgment on the fraud claim because it was preempted by ERISA. The District Court granted Sears' motion. The

District Court held that plaintiffs' fraud claims were preempted by ERISA because, under Section 514(a), they "relate to" the ERISA severance plan. After noting that the releases plaintiffs challenged on the grounds of misrepresentation "[fell] within the framework of ERISA," the District Court reasoned that "were it not for the Sears' retirement program, the plaintiffs would not have been asked to sign the releases. Were it not for the existence of the retirement plan the state fraud claims would not lie." App. 27. On appeal, however, the Court of Appeals reversed. *Forbus v. Sears Roebuck & Company*, 30 F.3d 1402 (11th Cir. 1994) ("*Forbus II*"). App. 1-12. The critical component for ERISA preemption, that court reiterated, was that "the state law in question must make reference to or function with respect to the ERISA plan in order for preemption to occur." App. 8, 10; 30 F.3d at 1405, 1406. In this case, reasoned the lower court, this prerequisite was absent: "[t]he Alabama fraud statute at issue in this case does not require the establishment or maintenance of an ongoing plan, makes no reference to an ERISA plan, and functions irrespective of any such plan." App. 12; *Id.* at 1407. The Court of Appeals held, therefore, that "ERISA does not preempt the plaintiffs' state claims in this case." *Id.*

REASONS FOR GRANTING THE WRIT

This case presents the Court with an appropriate vehicle to resolve a recurring issue of national importance. The decision below underscores the confusion in the courts below with respect to the application of *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) to state

laws of general application. This Court should now address that issue left unresolved by *McClendon*. In the present economic climate, employers frequently offer ERISA-qualified severance packages as an incentive for early retirement. If such plans are subject to varying and potentially contradictory state fraud laws, the resulting administrative burden is likely to deter national employers from offering such plans. This result is inconsistent with the avowed goals of ERISA to eliminate that type of risk and to promote uniformity in benefit plan administration. Certiorari should also be granted because the Court of Appeals' decision conflicts in principle with both this Court's decision in *McClendon* as well as the decisions of other Courts of Appeals that have applied *McClendon* to state laws of general application.

A. The Court Should Determine When ERISA Preempts State Laws Of General Application

The decision below reflects the confusion in the lower courts over when state laws of general application sufficiently "relate to" an ERISA plan to require ERISA preemption.[2] That confusion results, at least in part,

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[2] Section 514(a) states that ERISA preempts "any and all state laws insofar as they may now or hereafter *relate to* any employee benefit plan. . . . " 29 U.S.C. § 1144(a) (emphasis added). This Court has emphasized that § 514(a) is "conspicuous for its breadth," *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990), and "deliberately expansive" in order to " 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). "A law 'relates to' an employee benefit plan," therefore, according to

because of perceived contradictory pronouncements in *McClendon*. There, the Court held that a state law cause of action for wrongful discharge to prevent the attainment of pension benefits was preempted because it "related to" an ERISA plan.[3] Would the same result have been reached if the state law at issue was a law of general application? An affirmative answer could be based upon the Court's observation that a state law "relates to" an employee benefit plan "even if the law is not specifically designed to affect such plans, or the effect is only indirect," so long as "the existence of a pension plan is a critical factor in establishing liability under . . . [state] law." 498 U.S. at 139-40. Conversely, a negative answer could be supported by the Court's comment that "[w]e are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence

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Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983), "if it has a connection with or reference to such a plan."

[3] In *McClendon*, this Court held, in the alternative, that the plaintiff's state law claims were preempted because they fell within the purview of an ERISA cause of action and exclusive ERISA remedy as set forth in ERISA §§ 510 and 502(a). 498 U.S. at 144. Sears similarly argued in the court below that plaintiffs' fraud claims were preempted for that same independent reason, but the decision below does not address that issue. At minimum, therefore, this case should be remanded to the Eleventh Circuit for consideration of Sears' alternative argument that ERISA §§ 510 and 502(a) apply where, as here, plaintiffs allege that Sears fraudulently induced them to terminate employment and deprived them of further retirement benefits. *See Barnes v. Lacy*, 927 F.2d 539 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 372 (1991) (employee claims of fraudulent inducement to terminate employment and accept early retirement were pled solely under ERISA).

of an ERISA plan." *Id.* at 139. The Court of Appeals adopted the latter rationale. It concluded that "ERISA applies only peripherally, if at all" to the Alabama fraud statute, notwithstanding that *Forbus I* had held that the Sears severance plan was a critical factor in establishing liability, because the Alabama law "does not require the establishment or maintenance of any ongoing plan, makes no reference to an ERISA plan, and functions irrespective of any such plan." App. 12; 30 F.3d at 1407. This Court should decide whether this narrow reading of *McClendon* is correct.

The question presented is a recurring issue of national importance. In *District of Columbia v. Greater Washington Board of Trade*, 113 S.Ct. 580, 586 n. 3 (1992) (Stevens, J., dissenting), Justice Stevens noted that there were then over 2,800 judicial opinions addressing ERISA preemption. A recent LEXIS search reveals that nearly 400 cases have cited *McClendon*. There are two reasons for this burgeoning volume of ERISA litigation. *First*, ERISA pension plans are ubiquitous. According to recent statistics from the Department of Labor, the vast majority of full-time employees at medium and large size companies participate in some type of employee benefit program. *See* EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, U.S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 2422 (1993). Over 40% of all employees at medium and large size companies are eligible for some type of severance plan benefits. *Id. Second*, there is substantial confusion over the preemptive scope of Section 514(a), particularly in connection with state laws of general application. As Justice Stevens urged in *Greater Washington Board of Trade*, "it is time to take a fresh look at the

intended scope of the pre-emption provision that Congress enacted." 113 S.Ct. at 586. The lower courts have similarly expressed frustration with the lack of clear guidance in this area. As Judge Birch noted in dissent in *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 1578 (1993):

> In concluding I acknowledge the sage observation of the Fifth Circuit in *Gonzales v. Prudential Insurance Co.*, 901 F.2d 446 (5th Cir. 1990), that "any court forced to enter the ERISA preemption thicket sets out on a treacherous path." *Id.* at 451-52. Perhaps I have entered the thicket and lost the path that my brothers have found and followed. However, if nothing else is clear it is that the "path" is not; obviously the Supreme Court needs to do some serious bushhogging in the ERISA preemption thicket.

966 F.2d at 625. That same observation can be made in the instant case. The court below entered the preemption "thicket" and lost its way.

The lower courts' ongoing confusion over how to apply ERISA § 514(a) burdens employers such as Sears which offer national severance incentive plans to encourage voluntary termination or early retirement. These plans typically offer enhanced pension and welfare benefits in exchange for the employee's agreement to release the employer from all claims or causes of action. Given the recent erosion of the employment at will doctrine and the proliferation of state law causes of action for wrongful termination, including fraudulent inducement to terminate employment, it is essential that ERISA severance plans and their accompanying releases be subject to uniform federal regulation. If multistate ERISA severance

plans are subjected to varying and contradictory state fraud laws, the policy behind Section 514(a), which "was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law. . . . " (*McClendon*, 498 U.S. at 142), is thereby threatened. *See also, Shaw*, 463 U.S. at 105 (by establishing exclusive federal regulation "Congress minimized the need for interstate employers to administer their plans differently in each State in which they have employees."). The effect of *ad hoc* conflicting regulation by state juries will necessarily be to deter employers from offering severance incentive plans. State by state litigation with respect to the formation of a severance plan or the consequences of a plan release cannot be tolerated. That risk and uncertainty is precisely the burden that Congress intended to obviate by the preemption provisions of ERISA.

B. The Decision Below Conflicts, In Principle, With This Court's Decision In *McClendon* And With The Decisions Of Other Courts Of Appeals

The decision below conflicts in principle with this Court's decision in *McClendon* if, as Sears contends, *McClendon* enunciated a broad "but for" test that ERISA preemption applies whenever liability under state law is dependent upon the existence of an ERISA plan. *Cf., e.g.*, the similar "but for" preemption rule under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, set forth in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 411 (1988) (state law claims are preempted if such

questions "require construing collective bargaining agreements"). As previously demonstrated, absent the "supplemental" ERISA-qualified severance agreement between Sears and the plaintiffs, the plaintiffs would have been at will employees who could not have maintained a fraud action. Moreover, in order to even reach the merits of plaintiffs' claims, the trial court will have to determine the validity of releases which are inextricably intertwined with the ERISA plan.[4] Plaintiffs also seek to recover ERISA benefits as damages for Sears' purported fraud and have further agreed to offset against any damages award the ERISA benefits they have already received under the severance plan. The severance plan is, therefore, essential to establishing Sears' liability under Alabama fraud law. If *McClendon* sets forth a "but for" standard, the decision below conflicts with that test.

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[4] Plaintiffs acknowledged these points in their briefs and pre-trial order before the District Court prior to *Forbus I*. Plaintiffs' position in the pre-trial order was that " . . . the defendant's agents represented to the plaintiffs that they had 'no choice' but to elect certain options available under the plan and that it would 'do no good to consult an attorney.' " Plaintiffs further claimed that " . . . such representations were false and misleading and involuntarily coerced each of them to terminate their employment and accept benefits substantially less than the plaintiffs would be entitled to had they not been coerced and fraudulently included." App. 66. Additionally, in their briefs, plaintiffs claimed that "the fraud perpetrated on the plaintiffs . . . infected [*sic*] the validity of the Release" and that Sears misrepresented "the very terms of the [severance package]" when the Company allegedly told them they need not consult a lawyer and had only 24 hours to decide whether to sign the releases. R1-103.

The decision below also conflicts in principle with other appellate courts' interpretation of *McClendon*.[5] Numerous courts of appeals have cited *McClendon* for the proposition that ERISA preemption applies whenever the court's inquiry must address an ERISA plan – regardless of whether the state law in question applies generally and makes no reference to ERISA. *See, e.g., Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994) (state common law of misrepresentation is preempted because "the [ERISA] Plan is inseparably connected to any determination of liability under [state law]"); *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 9 (2d Cir. 1992) (in suit to enforce oral promise to pay benefits, court notes that "a state law of general application, with only an indirect effect on a pension plan, may nevertheless be considered to 'relate to' that plan for preemption purposes"); *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1219 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 68 (1992) (in suit for fraudulent inducement to terminate employment, court observes that ERISA preempts "any state law cause of action as it relates to an employee benefit plan, even if it arises under a general law which in and of itself has no connection to

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[5] *Forbus II* also conflicts in principle with the Eleventh Circuit's prior decision in *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 1578 (1993). In *Sanson*, the plaintiff alleged that his employer fraudulently induced him to terminate employment by representing that certain enhanced retirement benefits would not be available later. 966 F.2d at 619. In affirming summary judgment for the employer on the grounds of ERISA preemption, the Eleventh Circuit reasoned that the Georgia fraud statute would not apply to the case "without the existence of the retirement plan." *Id.* at 621. This is the very type of "but for" analysis rejected by the court below.

employee benefit plans"); *Moore v. Phillip Morris Companies*, 8 F.3d 335, 341 (6th Cir. 1993) (suit under general state forfeiture statute preempted by ERISA with the court noting that "whether [the statute] is preempted by ERISA depends not on the nature of the law itself but instead on whether [the statute] 'relate[s] to' an employee benefit plan"). There are, however, other appellate courts which, like the Court of Appeals in this case, require that the state law involved make some reference to, or have some connection with, the ERISA plan. *See, e.g., Airparts Company, Inc. v. Custom Benefits Services of Austin, Inc.*, 28 F.3d 1062, 1066 (10th Cir. 1994) (court held that state law fraud claims were not preempted by ERISA noting that "state laws of . . . fraud are 'laws of general application – not specifically targeting ERISA plans – that involve traditional areas of state regulation' ").[6] This case presents

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[6] State courts are also in conflict over whether *McClendon* mandates ERISA preemption whenever the court's inquiry must be directed at an ERISA plan. *Compare, e.g., Cutler v. Phillips Petroleum Co.*, 881 P.2d 216, 224 (Wash. 1994) (plaintiffs' state law tort and fraud claims are preempted "[b]ecause the court's inquiry must be directed to the plan" (quoting *McClendon*, 498 U.S. at 140)) *with Ingram v. American Chambers Ins. Co.*, 1994 Ala. LEXIS 297 (May 13, 1994) (plaintiffs' state law claim for fraud was not preempted under *McClendon* (489 U.S. at 139) because the state statute was "a generally applicable statute that makes no reference to, or . . . functions irrespective of, the existence of an ERISA plan.") *Ingram* also noted that the federal appellate courts are in conflict over this issue. *Id.* at *9 (citing a number of Courts of Appeals' decisions which pre-date *McClendon*). As Sears has established, the Circuits are still divided even after *McClendon*.

the Court with the opportunity to rectify this undesirable conflict involving an important federal statute.[7]

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: November 30, 1994

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[7] The court below also declared that "the mere fact that the plaintiffs' damages may be affected by a calculation of pension benefits is not sufficient to warrant preemption." App. 11; 30 F.3d at 1406-07. On this point, too, the circuits appear to be in conflict. *Compare Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120-21 (4th Cir. 1989) (ERISA does not preempt plaintiffs' claims merely because "the damages would be measured in part by the lost pension benefits the Plaintiffs could have received") *with Epps v. NCNB Texas*, 7 F.3d 44, 45 (5th Cir. 1993) ("When a court must refer to an ERISA plan to determine the plaintiff's retirement benefits and compute the damages claimed, the claim relates to an ERISA plan.").

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Vernal FORBUS; Earl J. Beacham; Rudolph Caddell; Frank R. Davis; Vernie Rhodes, Jr., Plaintiffs-Appellants,

v.

SEARS ROEBUCK & COMPANY, Defendant-Appellee.

No. 93-6404.

United States Court of Appeals, Eleventh Circuit.

Sept. 2, 1994.

Retirees brought suit against former employer, alleging state law fraud and other claims. Following remand, 958 F.2d 1036, the United States District Court for the Northern District of Alabama, No. CV-90-G-1299-S, J. Foy Guin, Jr., J., granted employer's motion to amend its answer to assert affirmative defense of preemption by Employee Retirement Income Security Act (ERISA), and granted employer's motion for summary judgment on state claims based on preemption by ERISA. Employees appealed. The Court of Appeals, Dubina, Circuit Judge, held that: (1) District Court did not abuse its discretion in allowing employer to amend its answer to include affirmative defense of preemption under ERISA, and (2) employees' state law fraud claims did not "relate to" ERISA plan, and thus were not preempted by ERISA.

Affirmed in part and reversed in part.

William C. Knight, Jr., J. Patrick Logan, Jennifer M. Busby, Birmingham, AL, for appellants.

William A. Robinson, Birmingham, AL, S. Richard Pincus, Joel W. Rice, Chicago, IL, for appellee.

Appeal from the United States District Court for the Northern District of Alabama.

Before ANDERSON and DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

DUBINA, Circuit Judge:

Vernal Forbus, et al. ("the plaintiffs") appeal the district court's grant of partial summary judgment to Sears Roebuck & Company ("Sears"). The plaintiffs challenge the district court's order allowing Sears to amend its answer in order to assert the affirmative defense of ERISA preemption, as well as the district court's conclusion that their state law fraud claims are preempted by ERISA. We hold that it was not an abuse of discretion for the district court to allow Sears to amend its answer. However, we hold that the district court erred in its conclusion regarding the ERISA preemption issue. Accordingly, we affirm in part and reverse in part.

I. *STATEMENT OF THE CASE*

A. *Facts*[1]

The plaintiffs were employed by Sears at a Retail Distribution Center ("RDC") in Birmingham, Alabama. The RDC was used by Sears to store and distribute merchandise to various retail outlets as well as customers'

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*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

[1] Because we are reviewing a grant of summary judgment, we must construe the facts in the light most favorable to the nonmovant – here, the plaintiffs. Thus, the factual summary is given in that context.

homes. In late October or early November, 1989, Neal Owings ("Owings"), General Manager of the RDC, announced at several employee meetings that the company planned to shut down the warehouse facility. Owings explained that the facility would be shut down, the jobs at the facility would be eliminated, and thus employment at the facility would be terminated as of December 31, 1989.

At a later meeting, the plaintiffs received a booklet which represented Sears' program or plan applicable to employees affected by the closing of one of its facilities. This plan has been called the "Retirement Incentive Package" (hereinafter, "the package"). Sears advised the plaintiffs that they had no choice but to elect to participate in the program, sign the release and elect the package of options, because failure to do so would result in termination as of December 31, 1989, with no benefits. The plaintiffs expressed their desire to continue employment with Sears; they did not wish to retire. Sears reiterated that they had no choice but to "involuntarily" retire. Accordingly, each of the plaintiffs elected voluntary retirement and participation in the program.

Sometime in January, 1990, the plaintiffs learned that the warehouse would become a Cross-Dock Center ("CDC"). Consequently, they requested reinstatement to their former positions, but were told that their former positions were no longer available. However, the plaintiffs' jobs were not actually eliminated. The plaintiffs contend that their positions were in fact filled by younger employees.

The plaintiffs brought suit against Sears alleging fraud, based on Sears' false representations concerning the closing of the facility. The crux of the plaintiffs' complaint is the fraudulent inducement to resign based on the closing of the facility.

B. *Procedural History*

The plaintiffs filed their complaint against Sears on June 26, 1990. The complaint was premised on the Age Discrimination in Employment Act ("ADEA"), as amended 29 U.S.C. § 621 *et seq.* and several state law causes of action in contract and fraud. Sears moved for summary judgment on all claims based on the plaintiffs' execution of releases. The district court denied the motion. Sears then moved for summary judgment on the plaintiffs' state law claims based on the employment-at-will doctrine and Sears' lack of intent to deceive. The district court granted the motion.

Sears took an interlocutory appeal with respect to th district court's denial of summary judgment on the plain tiffs' ADEA claims. The plaintiffs took an appeal from th order dismissing the state law fraud claims, which was final order. This court affirmed in part, reversed in pa and remanded the district court's order, holding that t plaintiffs could assert fraud claims under Alabama la because they were fraudulently induced to resign th positions with Sears. *Forbus v. Sears, Roebuck & Co.*, 9 F.2d 1036 (11th Cir.1992) ("*Forbus I*"). Sears then pe tioned the United States Supreme Court for certiorari its ADEA claims. Certiorari was denied, and the case w remanded to the district court. *Forbus I*, 958 F.2d 1

(11th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 412, 121 L.Ed.2d 336 (1993).

After remand, Sears moved to amend its answer in order to assert ERISA preemption as an affirmative defense. Sears contemporaneously filed a motion for partial summary judgment on the plaintiffs' state law claims based on the ERISA preemption argument. The district court granted Sears' motion for partial summary judgment and entered a final order dismissing all of the plaintiffs' state law fraud claims. The plaintiffs then perfected this appeal.

II. *STANDARD OF REVIEW*

A district court's decision to grant or deny leave to amend is reviewed for abuse of discretion. *Smith v. Duff and Phelps, Inc.*, 5 F.3d 488, 493 (11th Cir.1993).

Summary judgment should be granted where there is "no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed.R.Civ.P. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "The 'purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Wouters v. Martin County, Fla.*, 9 F.3d 924, 928 (11th Cir.1993), *quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). A grant of summary judgment is an issue of law to be reviewed *de novo*. *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1459 (11th Cir.1992).

III. *DISCUSSION*

A. *Leave to Amend*

The plaintiffs contend that the district court erred when it allowed Sears, over two and a half years after filing its original answer, to amend its answer in order to include the affirmative defense of ERISA preemption. District courts have broad discretion to grant or deny leave to amend. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Smith*, 5 F.3d at 493. In the absence of undue delay, bad faith, dilatory motive or undue prejudice, leave to amend is routinely granted. *Foman*, 371 U.S. at 182, 83 S.Ct. at 230; *Hassan v. U.S. Postal Service*, 842 F.2d 260, 263 (11th Cir.1988).

Here, we cannot find that the district court abused its discretion when it allowed Sears to amend its answer. Sears maintains that the plaintiffs were on notice as early as December of 1990 that Sears intended to assert ERISA preemption as an affirmative defense. Indeed, promptly after the parties' cross-appeals were resolved, and following quickly on the heels of this court's decision in *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1578, 123 L.Ed.2d 146 (1993), Sears moved to amend. Moreover, the plaintiffs show no prejudice from Sears' alleged delay.

The plaintiffs' contentions that Sears' ERISA preemption defense is barred by the law of the case doctrine, and that Sears waived that defense, are without merit and do not warrant further discussion. Therefore, we affirm the district court's order granting Sears leave to amend its answer.

B. *ERISA Preemption*

ERISA is a comprehensive legislative scheme enacted by Congress "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983). Through the enactment of ERISA, Congress also intended to safeguard "employers' " interests by "eliminating the threat of conflicting and inconsistent State and local regulation of employee benefit plans." *Id.* at 99, 103 S.Ct. at 2901, *quoting* 120 Cong.Rec. 29197, 29933 (1974). ERISA thus expressly provides for the preemption of "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . " 29 U.S.C. § 1144(a).

In dealing with the preemption issue, this court must at all times keep in mind this basic tenet: "[t]he question of whether a certain state action is preempted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987). Specifically, however, analysis of the preemption issue has focused on the "relate to" language of § 514(a) of ERISA. Indeed, the "key to § 514(a) is found in the words 'relate to.' " *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). The Supreme Court has explained that "a law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw*, 463 U.S. at 96-97, 103 S.Ct. at 2900. However, some laws may affect employee benefit plans in "too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Id.* at 100 n. 21,

103 S.Ct. at 2901 n. 21. Thus, even though the Supreme Court has afforded ERISA preemption a broad sweep, the Court has consistently "recognized limits to ERISA's preemption clause." *McClendon*, 498 U.S. at 139, 111 S.Ct. at 483.

This court has also recognized the limits of ERISA preemption. In *Sanson v. General Motors Corp.*, 966 F.2d 618, 621 (11th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1578, 123 L.Ed.2d 146 (1993), this court instructed that "a law normally would not be preempted if the statute did not require the establishment or maintenance of an ongoing plan, or if a statute makes no reference to, or functions irrespective of, a plan." In short, the mere existence of an ERISA plan is not enough for preemption. Rather, the state law in question must make reference to or function with respect to the ERISA plan in order for preemption to occur. *Id.*

In the present case, the district court found that the plaintiffs' claims "relate to" an ERISA plan. We disagree. In reaching its decision, the district court relied primarily on *McClendon* and *Sanson* for the proposition that ERISA preemption applies in this case. The district court's reliance on these cases was misplaced, however, because each is distinguishable from the present case. We discuss each case in turn.

In *McClendon*, the Supreme Court held that ERISA preempted a Texas common law claim that an employee was unlawfully discharged to prevent his attainment of benefits under a plan covered by ERISA. The Texas Supreme Court had held that ERISA did not preempt the

cause of action, reasoning that the plaintiff was not seeking lost pension benefits, but rather was seeking other measures of compensation, such as lost future wages and mental anguish. The Supreme Court disagreed with this analysis, and explained that there is no basis for "limiting ERISA actions to only those which seek 'pension benefits'." *McClendon*, 498 U.S. at 145, 111 S.Ct. at 486.

While *McClendon* is an example of the expansive nature of ERISA preemption, it is distinguishable from the present case. The plaintiff in *McClendon* was fired four months before his pension would have vested. He sued the company, claiming that his termination was motivated by the company's desire to avoid making contributions to his pension fund. Thus, he sought damages due to the loss of his *pension benefits plan*. This fact was of critical importance to the Court:

> Here, the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension *plan* itself.

Id. at 139-140, 111 S.Ct. at 483 (emphasis in original). Accordingly, the Court had "no difficulty" concluding that the plaintiff's claim "related to" an ERISA-covered plan and that it was therefore preempted. *Id.*

In contrast, the plaintiffs' claims in the case center on Sears' alleged fraud concerning the elimination of the plaintiffs' jobs, not fraud concerning an ERISA plan or any other benefits package. The plaintiffs have not claimed any fraud as it relates to the amount of pension

benefits received, nor have the plaintiffs made any allegation that Sears misrepresented the availability of pension benefits to the plaintiffs. Simply put, the plaintiffs contend that Sears lied when it informed them that their jobs were being eliminated.

This court considered the issue of ERISA preemption in *Sanson*. As noted above, we explained in *Sanson* that the mere existence of an ERISA plan is not enough to necessitate preemption. Rather, the state law in question must make reference to or function with respect to the ERISA plan in order for preemption to occur. *Sanson*, 966 F.2d at 621. Nonetheless, this court held in *Sanson* that ERISA preempted the plaintiff's cause of action.

Sanson, while instructive, is distinguishable from the present case. In *Sanson*, the plaintiff Chester Sanson ("Sanson") alleged that General Motors fraudulently represented to him that benefits under a special retirement program would not be offered to employees such as himself. Relying on this representation, Sanson retired early, opting to take the standard package of retirement benefits. He claimed that but for the fraudulent representation, he would have continued his employment until it became clear whether he would be eligible for the special retirement package. *Sanson*, 966 F.2d at 619. Thus, he sought to recover the enhanced retirement benefits and compensatory and punitive damages. *Id.*

This court held that Sanson's claim did relate to an employee benefit plan. In fact, just as in *McClendon*, the existence of a pension plan was "critical" to the case. *Id.* at 621.

> In this case, the misrepresentation relates to Sanson's retirement benefits available under GM's special retirement plan. The measure of damages would be the amount of benefits Sanson would have received under the retirement plan. Such a determination of damages demonstrates the relationship between the lawsuit and the special retirement plan.

Id. Obviously, the present case is distinguishable in that Sears' alleged misrepresentation did not involve a benefit plan – it involved the very existence of the plaintiffs' jobs. Furthermore, the mere fact that the plaintiffs' damages may be affected by a calculation of pension benefits is not sufficient to warrant preemption. *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120-21 (4th Cir.1989).

In various other recent cases in which our sister circuits have held that ERISA preempts state law, the relationship between the state law and an employee benefit plan has been clear. *See Moore v. Philip Morris Companies, Inc.*, 8 F.3d 335, 341 (6th Cir.1993) (Kentucky law providing for the disbursement of a decedents estate – specifically regarding pension benefits – is preempted by ERISA); *Anderson v. Electronic Data Systems Corp.*, 11 F.3d 1311, 1314 (5th Cir.1994) (wrongful discharge cause of action based on refusal to commit violations of ERISA is preempted by ERISA); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir.1994) (state law claims regarding failure of company to disclose its consideration of an enhanced severance program are preempted by ERISA); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1325 (5th Cir.1994) (state law regarding designation of a beneficiary relates to an ERISA plan and is therefore preempted). Such a clear connection is lacking here; in this case, the Alabama law

governing fraudulent misrepresentation does not "relate to" an employee benefit plan.

ERISA preemption serves an important purpose: it "establish[es] pension plan regulation as exclusively a federal concern." *McClendon*, 498 U.S. at 138, 111 S.Ct. at 482. However, ERISA preemption is not without boundaries. In the present case – in which ERISA applies only peripherally, if at all – it would defy common sense to allow ERISA to preempt a state law fraud claim. The Alabama fraud statute at issue in this case does not require the establishment or maintenance of an ongoing plan, makes no reference to an ERISA plan, and functions irrespective of any such plan. *Sanson*, 966 F.2d at 621. Therefore, we hold that ERISA does not preempt the plaintiffs' state claims in this case.

IV. *CONCLUSION*

For all of the foregoing reasons, we affirm the district court's order granting Sears leave to amend its answer, but we reverse the district court's holding that ERISA preempts the plaintiffs' state law claims.

AFFIRMED in part, and REVERSED in part.

United States Court of Appeals
For the Eleventh Circuit

No. 93-6404

District Court No. CV-90-G-1299

VERNAL FORBUS; EARL J. BEACHAM;
RUDOLPH CADDELL; FRANK R. DAVIS;
VERNIE RHODES, JR.,

Plaintiffs-Appellants,

versus

SEARS ROEBUCK & COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(Filed Sept. 2, 1994)

Before ANDERSON and DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court granting Sears leave to amend its answer in this cause be and the same is hereby AFFIRMED; the District Court's holding that ERISA pre-empts the appellants' state law claims is hereby REVERSED in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellants and defendant-appellee pay equally the costs on appeal, to be taxed by the Clerk of this Court.

Entered: September 2, 1994
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: SEPTEMBER 30, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-6404

VERNAL FORBUS; EARL J. BEACHAM;
RUDOLPH CADDELL; FRANK R. DAVIS;
VERNIE RHODES, JR.,

Plaintiffs-Appellants,

versus

SEARS ROEBUCK & COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(Filed Sept. 30, 1994)

ORDER:

(✓) The motion of *appellee, Sears, Roebuck & Company* for (XX) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of *appellee, Sears, Roebuck & Company* for (XX) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including *December 1, 1994,* the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon

the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay on the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

VERNAL FORBUS; EARL J. BEACHAM; RUDOLPH CADDELL; FRANK R. DAVIS; VERNIE RHODES, JR., Plaintiffs, v. SEARS ROEBUCK & COMPANY, Defendant.	)	CIVIL ACTION NO. 90-G-1299-S (Filed May 7, 1993)

ORDER

This cause comes before the court on the plaintiffs' motion for a rule 54(b) certification of final judgment granting defendant's motion for partial summary judgment. Having considered the motion, the pleadings, and the applicable law, the court is of the opinion the motion is moot. The court's April 14, 1993, final order granting partial summary judgment clearly denominated it was a final order at the time it was entered. And amended order of May 7, 1993, further clarifies the position of the court. Accordingly, it is

ORDERED, ADJUDGED and DECREED that the plaintiffs' motion for a rule 54(b) certification of final judgment granting defendant's motion for partial summary judgment be and it hereby is DECLARED MOOT, the court having designated its April 14, 1993, motion as a final order.

DONE and ORDERED this 7th day of May 1993.

/s/ J. Foy Guin, Jr.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing Defendant-Appellee Sears, Roebuck & Company On The Issue Of The Court's Jurisdiction Over The Appeal was served upon:

William C. Knight, Jr.
J. Patrick Logan
Jennifer M. Busby
Burr & Forman
3000 South Trust Tower
420 North 20th Street
Birmingham, Alabama 35203

via United States regular mail, this 29 day of June, 1993.

/s/ Davi L. Hirsch

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VERNAL FORBUS; EARL J. BEACHAM; RUDOLPH CADDELL; FRANK R. DAVIS; VERNIE RHODES, JR., Plaintiffs, v. SEARS ROEBUCK & COMPANY, Defendant.	)	CIVIL ACTION NO. 90-G-1299-S (Filed May 6, 1993)

ORDER

The Amended Order heretofore entered in this cause on the 4th day of May 1993 is hereby WITHDRAWN AND REPLACED by the following Amended Judgment Order:

AMENDED JUDGMENT ORDER

It is hereby ORDERED that the wording of the April 14, 1993, final order granting partial summary judgment be AMENDED in the following manner, nunc pro tunc as of the 14th day of April 1993:

1) The paragraph reading: "FURTHER ORDERED, ADJUDGED and DECREED that FINAL JUDGMENT be and it hereby is ENTERED in favor of the defendant, and the plaintiffs shall have and recover nothing of the defendants in this action." be and it

hereby is CORRECTED to read: "FURTHER ORDERED, ADJUDGED and DECREED that FINAL JUDGMENT be and it hereby is ENTERED in favor of the defendant, and the plaintiffs shall have and recover nothing of the defendants in this action on counts 2 through 6 of the complaint."

2) The paragraph reading: "FURTHER ORDERED, ADJUDGED and DECREED that all outstanding motions be and they hereby are DECLARED MOOT by the entry of this order." be and it hereby is DELETED.

DONE and ORDERED this 6th day of May 1993.

/s/ J. Foy Guin, Jr.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

VERNAL FORBUS; EARL J. BEACHAM; RUDOLPH CADDELL; FRANK R. DAVIS; VERNIE RHODES, JR., Plaintiffs, v. SEARS ROEBUCK & COMPANY, Defendant.	)	CIVIL ACTION NO. 90-G-1299-S (Filed April 14, 1993)

FINAL ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This cause comes before the court on the motion of Sears Roebuck & Company for partial summary judgment on all of plaintiffs' state law fraud claims (Counts II through VI). Having considered the motion, the pleadings, the submissions of counsel, and the applicable law, the court is of the opinion that judgment is due the defendant as a matter of law, there being no genuine issue of material fact, and there being no just reason for delay in entering a final judgment. Accordingly, in conformity with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the motion of Sears Roebuck & Company for partial summary judgment on all of plaintiffs' state law fraud claims

(Counts II through VI) be and it hereby is GRANTED. It is

FURTHER ORDERED, ADJUDGED and DECREED that FINAL JUDGMENT be and it hereby is ENTERED in favor of the defendant, and the plaintiffs shall have and recover nothing of the defendant in this action. It is

FURTHER ORDERED, ADJUDGED and DECREED that all outstanding motions be and they hereby are DECLARED MOOT by the entry of this order.

DONE and ORDERED this 14th day of April 1993.

/s/ J. Foy Guin, Jr.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

VERNAL FORBUS; EARL J. BEACHAM; RUDOLPH CADDELL; FRANK R. DAVIS; VERNIE RHODES, JR., Plaintiffs, v. SEARS ROEBUCK & COMPANY, Defendant.	)	CIVIL ACTION NO. 90-G-1299-S (Filed April 14, 1993)

MEMORANDUM OPINION

The plaintiffs, retirees of Sears Roebuck & Company [hereinafter Sears], brought suit under the Age Discrimination in Employment Act against Sears alleging that they accepted voluntary severance packages and executed releases under duress, and that misrepresentations were made to them by Sears in connection with their retirement. The retirees asserted state law claims, including breach of contract and fraud. This court granted partial summary judgment to the employer on the state law claims and denied Sears' motion for summary judgment on the claim that by retaining the benefits the retirees had ratified the releases. The court denied Sears' motion for reconsideration of the summary judgment ruling.

An appeal was taken by both the employer and the retirees. The Eleventh Circuit affirmed in part and

reversed and remanded in part, holding that the retirees could assert fraud claims under Alabama law, notwithstanding their former status as at-will employees.

After several meetings with counsel and briefing of the issue, at a status conference on January 25, 1993, following the law as set by the Eleventh Circuit in *Sanson v. General Motors Corporation*, 966 F.2d 618 (11th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3648 (U.S. Mar. 22, 1993) (No. 92-1015), confirming ERISA preemption of state law claims for fraudulent inducement to terminate employment and ERISA preemption of state law claims for fraudulent inducement to accept an ERISA package, the court allowed Sears to amend its answer.[1] On January 29, 1993, Sears filed an amended answer setting forth the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, 1144(a) [hereinafter ERISA], preemption as a jurisdictional bar and affirmative defense.

The defendant's renewed motion for partial summary judgment on the state law claims is presently before the court. Section 514 (a) of ERISA expressly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . . " 29 U.S.C. § 1144 (a). Courts have interpreted the language "relates to" broadly. *District of Columbia v. Greater Washington Board of Trade*, 113 S. Ct. 580, 121 L. Ed. 2d 513 (1992) (Local regulation of otherwise ERISA exempt benefit plans is preempted even where such laws merely refer to other ERISA-qualified plans in setting benefit levels); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.

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[1] *Sanson* was decided during the pendency of the parties' cross appeals.

Ct. 478, 482-83, 112 L. Ed. 2d 474 (1990) (State laws may relate to an employee benefit plan "even if the law is not specifically designed to affect such plans or the effect is only indirect.") *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983) (A law relates to an employee benefit plan if it has a connection with or reference to such a plan.). *See also District of Columbia v. Washington Trade Board*, 506 U.S. ___, 113 S. Ct. 580, 121 L. Ed. 2d 513 (1992), in which the court held that ERISA preempted a District of Columbia provision which required companies that provided health insurance for their employees to provide equivalent coverage for injured employees who were eligible for workers' compensation benefits. "Under § 514(a), ERISA preempts any state law that refers to or has a connection with covered benefit plans (and that does not fall within a § 514(b) exception) 'even if the law is not specifically designed to affect such plans, or the effect is only indirect.' . . . , and even if the law is 'consistent with ERISA's substantive requirements.' " *Washington Trade Board*, 121 L. Ed. 2d at 520.

In *Ingersoll-Rand*, the Supreme Court found that an employee's state law wrongful discharge claims were expressly preempted by ERISA. The court found that the state law cause of action "related to" an ERISA plan. The state law claims were preempted because they fell within an ERISA cause of action for which ERISA was the exclusive remedy.

Relying upon *Ingersoll-Rand*, in *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir. 1992), upon facts

similar to those before the court,[2] the Eleventh Circuit held that a state law claim of fraudulent inducement to terminate employment was preempted by ERISA. *Sanson* at 621. The court specifically found that the state fraud statute would not apply to the *Sanson* case without the existence of a retirement plan. *Sanson* at 620, 621. Reliance was placed on the *Sanson* holding in *Barr v. American Cyanamid Co.*, 808 F. Supp. 752 (W.D. Wash. 1992). The *Barr* court held that the employee's state law claims for fraud and negligent misrepresentation, arising from the employer's representations concerning the availability of an early retirement program, were preempted by ERISA. Any claims for misrepresentations" were "related to" an ERISA plan.

The court holds that in the case at bar the plaintiffs' state law fraud claims are preempted by ERISA. The Sears "Unit Closing Severance Allowance Plan" is an ERISA qualified benefits plan. On its face the plan states it "is a welfare benefit plan under the terms of the Employee Retirement Income Security Act of 1974 and covers employees of Sears Merchandise Group." Sears' "Unit Closing Severance Allowance Plan" expressly states that as a condition precedent to receipt of the plan benefits, each employee must "sign a General Release and Waiver." The plaintiffs' signed releases were executed

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[2] In *Sanson*, the plaintiff alleged that his employer fraudulently represented that certain enhanced retirement benefits would not be available, thereby inducing him to retire early with less favorable benefits than those received by other employees who later retired under a special early retirement program.

pursuant to the terms of that ERISA benefit plan. Plaintiffs have sought to void the releases on the grounds of misrepresentation. These releases, however, fall within the framework of ERISA. Were it not for the Sears' retirement program, the plaintiffs would not have been asked to sign the releases. Were it not for the existence of the retirement plan the state fraud claims would not lie. The "misrepresentations" arising from Sears' intended plans which resulted in the plaintiffs' voluntary, early retirement were "related to" the Sears' ERISA plan. Being "related to" the ERISA plan, the plaintiffs' claims for fraudulent misrepresentations are preempted by ERISA. The court holds that ERISA preemption applies to the state fraud claims. Accordingly, Sears is entitled to summary judgment as a matter of law.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED this 14th day of April 1993.

/s/ J. Foy Guin, Jr.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

VERNAL FORBUS; EARL J. BEACHAM; RUDOLPH CADDELL; FRANK R. DAVIS; VERNIE RHODES, JR., Plaintiffs, v. SEARS ROEBUCK & COMPANY, Defendant.	)	CIVIL ACTION NO. 90-G-1299-S (Filed Jan. 26, 1993)

ORDER

This cause comes before the court on defendant's motion for leave to file an amended answer to assert ERISA preemption as a jurisdictional bar and an affirmative defense in light of the holding in *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir. 1992). Having considered the motion, the pleadings, the submissions of counsel, and the applicable law, and having noted that defendant first raised this issue on December 17, 1990, the court is of the opinion the motion should be granted. Accordingly, consistent with the holding announced at the status conference held on January 25, 1993, it is

ORDERED, ADJUDGED and DECREED that defendant's motion for leave to file an amended answer to

assert ERISA preemption as a jurisdictional bar and an affirmative defense be and it hereby is GRANTED.

DONE and ORDERED this 26th day of January 1993.

/s/ J. Foy Guin, Jr.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names Of Parties

April 20, 1992

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

Nos. 91-7358 & 91-7479 FORBUS et al. V. SEARS ROEBUCK & COMPANY

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to Rule 36 of the Federal Rules of Appellate Procedure. Fed.R.App.P. 39, 40 and 41, and the corresponding circuit rules govern costs, petitions for rehearing and mandate, respectively.

To be timely, a petition for rehearing or a suggestion of en banc consideration must be received in the clerk's office within twenty-one (21) days of the date of this opinion and judgment. No additional time for service by mail is permitted. *See* 11th Cir. R. 40-2.

Pursuant to *Davidson v. City of Avon Park,* 648 F.2d 172 (11th Cir., 1988), if attorney's fees on appeal are authorized by law they must be sought by filing a petition for attorney's fees with this office within fourteen (14) days of the date of the court's opinion. Any request for attorney's fees received after that date must be accompanied by a motion to file out of time.

In a direct criminal appeal, 11th Cir. R. 41-1 provides that issuance of the mandate shall not be stayed simply upon request: "Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay."

Counsel appointed under the Criminal Justice Act are reminded that 11th Cir. R. Addendum Four, section (f)(4), provides: "In the event of affirmance or other decision adverse to the party represented appointed counsel shall promptly advise the party in writing of the right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court. Counsel shall file such petition if requested to do so by the party in writing."

Sincerely,

MIGUEL J. CORTEZ, Clerk

By: /s/ Nancy Gilman
Deputy Clerk

Encl.

c: William A. Robinson, William F. Gardner
S. Richard Pincus, Steven L. Gillman
William C. Knight, Jr., J. Patirck [sic] Logan

Note: No. 91-7358 costs are taxed against appellant.
No. 91-7479 costs are taxed equally.

Vernal FORBUS, Earl J. Beacham, Rudolph Caddell, Frank R. Davis, Vernie Rhodes, Jr., Plaintiffs-Appellees,

v.

SEARS ROEBUCK & COMPANY, Defendant-Appellant.

Vernal FORBUS, Earl J. Beacham, Rudolph Caddell, Frank R. Davis, Vernie Rhodes, Jr., Plaintiffs-Appellants,

v.

SEARS, ROEBUCK & COMPANY, Defendant-Appellee.

Nos. 91-7358, 91-7479.

United States Court of Appeals, Eleventh Circuit.

April 20, 1992.

Retirees brought suit under the Age Discrimination in Employment Act (ADEA) against former employer, alleging that they accepted voluntary severance packages and executed releases under duress, and that misrepresentations were made to them by employer in connection with their retirement. Retirees also asserted state law claims, including breach of contract and fraud. Employer moved for summary judgment, asserting that retirees ratified releases by retaining benefits. The United States District Court for the Northern District of Alabama, No. CV-90-G-01299-S, J. Foy Guin, Jr., J., denied motion, and employer's subsequent motion to reconsider order denying summary judgment. Partial summary judgment was granted to employer on state law claims. Employer and retirees appealed. After consolidation of appeals, the

Court of Appeals, Dubina, Circuit Judge, held that: (1) order denying employer's motion for reconsideration of denial of summary judgment was appealable under collateral order doctrine; (2) retirees were not required to tender retirement benefits back to employer as prerequisite to maintenance of suit, and their retention of severance benefits during pendency of suit did not constitute ratification of releases; and (3) retirees could assert fraud claims under Alabama law, notwithstanding their former status as at-will employees.

District court's order in case No. 91-7358 affirmed; order in case No. 91-7479 affirmed in part and reversed in part.

Cox, Circuit Judge, filed dissenting opinion.

Cabaniss, Johnston, Gardner, Dumas & O'Neal, William A. Robinson & R. Taylor Abbott, Jr., Birmingham, Ala., S. Richard Pincus, Fox & Grove, Joshua D. Holleb, Steven L. Gillman, Chicago, Ill., for defendant-appellant.

William C. Knight, Jr., Burr & Forman, J. Patrick Logan, Birmingham, Ala., for plaintiffs-appellees.

Appeals from the United States District Court for the Northern District of Alabama.

Before COX and DUBINA, Circuit Judges and GODBOLD, Senior Circuit Judge.

DUBINA, Circuit Judge:

In Case No. 91-7358, Sears, Roebuck & Company ("Sears") appeals the district court's order denying Sears'

motion for reconsideration of the denial of summary judgment on the issue of whether Vernal Forbus, Earl J. Beacham, Rudolph Caddell, Frank R. Davis, and Vernie Rhodes, Jr. (collectively referred to as "the Retirees"), have waived suit against Sears pursuant to releases they executed upon retirement. In Case No. 91-7479, the Retirees appeal the district court's order granting summary judgment in favor of Sears on all of the Retirees' state law claims. For the reasons which follow, we affirm the district court's order in Case No. 91-7358, and affirm in part and reverse in part the district court's order granting summary judgment in Case No. 91-7479.

I. FACTUAL BACKGROUND

The Retirees were employed by Sears at a Retail Distribution Center ("RDC") in Birmingham, Alabama. In the fall of 1989, the Retirees were informed that Sears planned to convert the RDC into a Home Delivery Center ("HDC"), which would substantially reduce the number of jobs available. A severance incentive package ("the package") was offered to encourage voluntary severance. Acceptance of the package required execution of a release and waiver which precluded the retiring employee from bringing any action against Sears as a result of termination from employment with Sears. Each Retiree accepted the package, retired early, and received the promised severance benefits, which were more substantial than the benefits would have been had the Retiree not elected the package.

Thereafter, Sears changed its restructuring plans advising the remaining employees that instead of an

HDC the RDC would be converted to a Cross-Dock Center, which required a work force somewhere in-between that needed for an RDC or HDC. All Retirees except Beacham asked for their jobs back, but were informed that no jobs were available. The Retirees then filed charges of age discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that they accepted their packages and executed the releases under duress, and that misrepresentations were made to them by Sears. None of the Retirees has tendered his severance payments back to Sears. Instead, each has offered to offset any award received in his lawsuit by the amount of severance benefits accepted.

The Retirees' complaint alleges a claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., as amended ("ADEA"), and several state law claims, including breach of contract and fraud. Sears filed a motion for summary judgment based upon the Retirees' failure to unconditionally tender back the severance payments, arguing that even if questions of fact existed concerning the validity of the releases because of fraud and duress, the Retirees ratified the releases by retaining the benefits. The district court denied Sears' motion on the grounds that genuine issues of material fact existed and that the Retirees' offer to offset any award was sufficient tender. Sears filed a motion asking the district court to certify its order for interlocutory appeal; it was denied. Shortly thereafter, the Fifth Circuit issued its opinion in *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir.1991), which resolved in Sears' favor issues identical to those presented in this case. Sears filed a motion asking the district court to reconsider its order denying summary

judgment in light of *Grillet;* it was denied. Sears then perfected its appeal to this court.

Sears also filed a motion for partial summary judgment as to each of the Retirees' state law claims.[1] The district court granted that motion in its entirety. The district court found that because the Retirees were at will employees, their breach of contract claims failed and they sustained no recoverable damages even if Sears were guilty of fraud. The district court also found that there was no evidence that Sears manifested a present intent to deceive the Retirees at the time the package was presented to them, and that Alabama does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing in an at will employment contract. The district court certified its order granting summary judgment pursuant to Fed.R.Civ.P. 54(b), from which the Retirees perfected their appeal. The two appeals were then consolidated by this court.

II. SEARS' APPEAL

A. *Jurisdiction*

Before discussing the merits of Sears' appeal, we must first determine whether the case is properly before us. Interlocutory orders are not appealable as a general rule. *See* 28 U.S.C. § 1291. Sears argues, however, that we have jurisdiction to hear its appeal pursuant to the collateral order doctrine, a judicially created exception to 28

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[1] Sears' motion for summary judgment did not include the Retirees' ADEA claims, which remain pending before the district court and are not at issue in this appeal.

U.S.C. § 1291. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The collateral order doctrine is applicable only if the order being reviewed satisfies the following three conditions: "It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.' " *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978)).

The Fifth Circuit recently applied the collateral order doctrine to review an interlocutory order denying summary judgment which effectively denied enforcement of a release agreement. *See Grillet*, 927 F.2d at 219-20. The Second Circuit also applied the doctrine in a similar context when it determined that it had jurisdiction to review an order denying a defendant's motion to enforce a settlement agreement. *See Janneh v. GAF Corp.*, 887 F.2d 432, 434-35 (2d Cir.1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 177, 112 L.Ed.2d 141 (1990). The Supreme Court has held that the deprivation of a right not to go to trial is effectively unreviewable after final judgment and is immediately appealable. *See Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499-500, 109 S.Ct. 1976, 1978-79, 104 L.Ed.2d 548 (1989). In civil cases, although the Court has not addressed the precise question presented here, it has determined that an immediate appeal may be taken from orders denying motions to dismiss based upon absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43, 102 S.Ct. 2690, 2697-98, 73 L.Ed.2d 349 (1982), or qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511, 525, 105 S.Ct.

2806, 2814-15, 86 L.Ed.2d 411 (1985), as well as orders denying motions to compel arbitration, *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11, 103 S.Ct. 927, 934, 74 L.Ed.2d 765 (1983).

We agree with the Fifth and Second Circuits that the collateral order doctrine should be applied to review an interlocutory order which denies enforcement of an agreement to forego litigation. We must now determine whether the order from which Sears appeals meets the requirements for review.

To meet the first requirement, the order must have been entered as "the final word on the subject addressed." *Moses H. Cone Hosp.*, 460 U.S. at 12-13 n. 14, 103 S.Ct. at 935 n. 14. The district court's denial of Sears' motion to reconsider was intended to be the final word on whether Sears could avoid litigation on the basis of the releases, so the first requirement is satisfied.

To meet the second requirement, the facts and issues involving ratification of the releases must be separate and distinct from the facts and issues involving the Retirees' underlying ADEA claims. Since the issue of ratification is not related to the ADEA claims, the second requirement is satisfied.

The third requirement is also satisfied. The essence of Sears' claim regarding ratification is that it contracted for the right to avoid being sued by the Retirees.

After considering the foregoing, we are persuaded that the collateral order doctrine vests this court with jurisdiction to review the merits of Sears' appeal.

B. *Ratification*

We now consider whether the Retirees have ratified the releases by retaining the benefits received thereunder. We review this issue de novo. *Akins v. Snow,* 922 F.2d 1558, 1560 (11th Cir.), *cert. denied,* ___ U.S. ___, 111 S.Ct. 2915, 115 L.Ed.2d 1079 (1991). The district court's conclusions of law on summary judgment are subject to the same standard of appellate review as any question of law raised on appeal. *Morrison v. Washington County, Alabama,* 700 F.2d 678, 682 (11th Cir.), *cert. denied,* 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983), *modified on other grounds, Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc.,* 818 F.2d 1530 (11th Cir.1987).

Sears argues that even if the releases were tainted by misrepresentation or duress, the Retirees ratified them as a matter of law by accepting the benefits of the bargain. Sears insists that the Retirees cannot be allowed to retain the severance benefits at the same time they deny Sears the benefit of its bargain by maintaining this lawsuit. The Retirees contend that the tender back of their severance benefits is not an absolute requirement.

The district court based its determination that the Retirees' tender was sufficient under Alabama law. In that respect, the district court was in error. In *Hogue v. Southern Ry. Co.,* 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968), which involved a suit under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. ("FELA"), the Supreme Court held that "[t]he question whether a tender back of the consideration was a prerequisite to the bringing of the suit is to be determined by federal rather than state law." 390 U.S. at 517, 88 S.Ct. at 1151. Although

Hogue involved FELA claims, we find *Hogue*'s reasoning persuasive regarding the application of federal law to the ADEA claims presented in the instant case. *See also Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1516-17 (11th Cir.1985) (federal common law governs the impact of agreements involving federal law claims).

The Supreme Court proceeded in *Hogue* to reject the tender requirement in FELA lawsuits. The Court held that tender of consideration was not only excused where fraud was involved in the execution of a release, but also was not required in the event of a mutual mistake. The Court also held that a rule which required a refund would be incongruous with the general policy of the FELA. One district court has relied on *Hogue* to reject tender requirements in an ADEA case. *See Isaacs v. Caterpillar, Inc.*, 765 F.Supp. 1359 (C.D.Ill.1991). Other courts have applied *Hogue* to reject tender requirements in cases involving other federal remedial statutes. *See, e.g., Smith v. Pinell*, 597 F.2d 994, 996 (5th Cir.1979) (Jones Act); *Wahsner v. American Motors Sales Corp.*, 597 F.Supp. 991, 998 (E.D.Pa.1984) (Automobile Dealers' Day in Court Act).

Two other circuits have examined the ratification question presented here and held that a releasor's retention of benefits, after learning that a release is voidable, constitutes a ratification of the release. *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 362-63 (4th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 177, 116 L.Ed.2d 139 (1991); *Grillet*,

927 F.2d at 220.[2] In neither case, however, did the court consider the *Hogue* decision. We can find no basis for rejecting the Supreme Court's reasoning in *Hogue* and not applying it to ADEA claims as well as FELA claims. Both are remedial statutes designed to protect employees. We agree with, and find persuasive, the reasoning set forth in *Isaacs* that explains public policy considerations supporting our determination that the Retirees should not be required to tender their retirement benefits back to Sears as a prerequisite to the maintenance of their lawsuit. 765 F.Supp. at 1366-68.

The Court in *Hogue* found that a tender requirement would deter meritorious challenges to releases in FELA lawsuits. The same deterrence factor applies to ADEA claims. Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases obtained by misrepresentation or duress. Such a rule would, in our opinion, encourage egregious behavior on the part of employers in forcing certain employees into early retirement for the economic benefit of the company. The ADEA was specifically designed to prevent such conduct, and we reject a tender requirement as a prerequisite to instituting a challenge to a release in an ADEA case. As the Supreme

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[2] In *Cumberland & Ohio Co. of Texas, Inc. v. First American Nat'l Bank*, 936 F.2d 846, 850 (6th Cir.1991), the Sixth Circuit held that generally, a releasor who retains consideration after learning that a waiver and release is voidable effectively ratifies the release, citing *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir.1991). *Cumberland* was not an employment case, however, nor were ADEA claims a factor as they are in the case before us.

Court decided in *Hogue*, unless the release otherwise bars recovery, the benefits paid "shall be deducted from any award determined to be due to the injured employee." 390 U.S. at 518, 88 S.Ct. at 1152.

We conclude that, as a matter of federal law, ADEA plaintiffs are not required to tender the consideration received for releases as a condition prerequisite to challenging those releases in court, and that the Retirees' retention of their severance benefits during the pendency of this lawsuit does not constitute ratification of those releases. We therefore affirm the district court's order denying Sears' motion for reconsideration of the denial of its motion for summary judgment.

III. THE RETIREES' APPEAL

In any appeal from an order granting summary judgment, this court's review is plenary, and we apply the same legal standards as those that controlled the district court in determining whether summary judgment is appropriate. *Hoffman v. Allied Corp.*, 912 F.2d 1379 (11th Cir.1990). We must also review a district court's interpretation of state law de novo. *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190 (1991).

The Alabama courts have consistently adhered to the principle that at will employment contracts can be terminated by either party with or without cause or justification. *Hinrichs v. Tranquilaire Hosp.*, 352 So.2d 1130, 1131 (Ala.1977). An at will employee in Alabama can be discharged for any reason, regardless of whether the employer's motive is reasonable, unreasonable, justified,

unjustified, indifferent, malicious, or even illegal. *Id.*; *Jones v. Ethridge*, 497 So.2d 1107 (Ala.1986); *Williams v. Killough*, 474 So.2d 680 (Ala.1985); *Reich v. Holiday Inn*, 454 So.2d 982 (Ala.1984). Furthermore, Alabama does not recognize an independent tort action for bad faith breach of an employment contract. *Hoffman-LaRoche, Inc. v. Campbell*, 512 So.2d 725, 738 (Ala.1987). Accordingly, we affirm that portion of the district court's order granting summary judgment in favor of Sears on the Retirees' claims for breach of their existing employment contracts and breach of the covenant of good faith.[3]

The district court also granted summary judgment in favor of Sears on the Retirees' claims for misrepresentation, suppression of material facts, and fraudulent inducement to terminate their employment ("the fraud claims"), relying on *Salter v. Alfa Ins. Co.*, 561 So.2d 1050 (Ala.1990). In *Salter*, the court upheld the termination of an at will employee and rejected the employee's fraud claim, holding that even if the elements of actionable fraud based on a misrepresentation to the plaintiff were proven, the fraud claim must fail because the plaintiff suffered no damages as a consequence of her at will status. We find, however, that the employment at will doctrine does not control the Retirees' fraud claims; therefore, *Salter* is not dispositive of these claims.

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[3] The Retirees argue that material issues of fact remain which should have prevented the district court from entering summary judgment on their state law claims. We find no material factual disputes as to the breach of contract or bad faith claims which would require resolution at trial; therefore, we see no merit to the Retirees' argument as to those claims.

Certainly the Retirees were at will employees before their retirement. Had Sears fired them, they would have had no cause of action for either breach of contract or fraud as a result of the termination of the employment relationship. In this case, however, Sears made a new arrangement with the Retirees prior to their termination in which Sears agreed to provide enhanced severance benefits in return for the Retirees' agreement to execute releases and waivers. It is this supplemental contract, offered by Sears and accepted by the Retirees' that the Retirees say they were fraudulently induced to enter and about which they claim misrepresentations were made and facts suppressed.[4] The Retirees' employment at will status that existed prior to this supplemental contract is only relevant to explain why the new arrangement was offered and accepted.

The Retirees rely on *Smith v. Reynolds Metals Co.*, 497 So.2d 93 (Ala.1986) in support of their argument that they should be allowed to maintain their fraud claims. In

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[4] The Retirees also allege that Sears breached this supplemental contract by "not providing [the Retirees] time to consider acceptance of the contract or consult with an attorney regarding the effect of accepting the contract." (Retirees' complaint ¶ 36.) Even accepting these allegations as true, we do not find them sufficient to make out a claim for breach of the supplemental contract. Sears performed fully its obligations within the four corners of the supplemental contract. It delivered all promised consideration. The Retirees' allegations relate specifically to the elements surrounding the contract's formation, not its breach. Thus, the district court correctly granted summary judgment in favor of Sears on the Retirees' claim for breach of the supplemental contract.

Reynolds, the court upheld the entry of summary judgment for Reynolds on the plaintiff's breach of contract claim on the basis of the employee at will doctrine, but reversed the entry of summary judgment on the plaintiff's misrepresentation claim. The claim alleged misrepresentations were made to the plaintiff about her employment status, i.e., that she was not hired as an employee at will, but one employed for the specified term of a summer. The court held that this claim was not an attempt to get around the bar of suit on the basis of termination of employment status, but rather, was a claim that the plaintiff was fraudulently misled into believing that she would not be an employee at will. This is a collateral matter, like the new contract for severance in the present case. We agree with the court's analysis in *Reynolds*, and find that it is controlling in the instant case. We therefore reverse that portion of the district court's order granting summary judgment in favor of Sears on the Retirees' fraud claims.

IV. CONCLUSION

We affirm the district court's order in Case No. 91-7358. We affirm the district court's order in part in Case No. 91-7479 relative to the breach of contract and breach of the covenant of good faith claims, but reverse that portion of the order granting summary judgment as to the Retirees' fraud claims and remand the case for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

COX, Circuit Judge, dissenting:

The majority concludes that this court has jurisdiction over Sears's appeal from the district court's order denying summary judgment based upon the collateral order doctrine. Because I believe that the collateral order doctrine is not applicable, I respectfully dissent.

Ordinarily, interlocutory orders are not appealable. *See* 28 U.S.C. § 1291. The Supreme Court recognized a narrow exception to this rule in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Cohen* established the collateral order doctrine, which provides that an interlocutory order may be appealed if it conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from a final judgment. *See; e.g., Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985).

Sears argues that the Plaintiffs executed valid releases of all claims in exchange for generous severance benefits. Based upon these releases, Sears asserted a right not to be sued by the Plaintiffs and moved for summary judgment. The district court denied summary judgment. The majority holds that this court has jurisdiction to review the district court's order denying Sears's motion for summary judgment because the order 1) conclusively determined Sears's right to avoid litigation based upon the releases, 2) resolved an important question separate and distinct from the merits of the ADEA claims, and 3) is effectively unreviewable on appeal from final judgment because the litigation will already have taken place. *See supra* at 1039.

The majority's conclusion is supported by two decisions from other circuits. *See Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir.1991) (exercising jurisdiction based on the collateral order doctrine under circumstances almost identical to the case at bar); *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir.1989) (applying the collateral order doctrine to review district court's refusal to enforce settlement agreement which plaintiff allegedly breached by maintaining his lawsuit). While these cases are on point, their holdings violate the Supreme Court's mandate that the collateral order doctrine be construed narrowly.

I find two recent Supreme Court decisions to be instructive. In *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989), the Court held that a criminal defendant was not entitled to an interlocutory appeal from the district court's order denying a motion to dismiss a grand jury indictment on the ground that the prosecution had engaged in illegal public disclosure. It rejected the defendant's claim (which was similar to the claim in this case) that it had a right not to be tried and thereby satisfied the three requirements of the *Cohen* collateral order doctrine. "A right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit *statutory or constitutional* guarantee that trial will not occur – as in the Double Jeopardy Clause . . . or the Speech or Debate Clause. . . . " *Id.* at 801, 109 S.Ct. at 1499 (citations omitted) (emphasis added).

In *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989), a civil case, the Supreme Court affirmed the Second Circuit's refusal to hear an

interlocutory appeal from the district court's order denying a motion to dismiss based upon a forum selection clause. The Court noted that the defendant had bargained for and received the right not to be sued except in Italy. Nevertheless, the Court held that:

> Petitioner's claim that it may be sued only in Naples, while not perfectly secured by appeal after final judgment, is adequately vindicable at that stage – surely as effectively vindicable as a claim that the trial court lacked personal jurisdiction over the defendant – and hence does not fall within the third prong of the collateral order doctrine.

Id. at 501, 109 S.Ct. at 1979.

Justice Scalia's concurring opinion in *Lauro Lines* is particularly instructive.

> While it is true . . . that the "right not to be sued elsewhere than in Naples" is not fully vindicated – indeed, to be utterly frank, is positively destroyed – by permitting the trial to occur and reversing its outcome, that is vindication enough because the right is not sufficiently important to overcome the policies militating against interlocutory appeals. We have made that judgment when the right not to be tried in a particular court has been created through jurisdictional limitations established by Congress or international treaty. . . . The same judgment applies – if anything, *a fortiori* – when the right has been created by private agreement.

Id. at 502-03, 109 S.Ct. at 1980.

I conclude that Sears's asserted right not to be sued based upon private agreements – the releases entered into

by the Plaintiffs – is not sufficiently important to justify an interlocutory appeal.

The policies underlying the general rule that interlocutory orders are not appealable are important. The majority's approach creates yet another category of cases where interlocutory appeals are permitted. I would not create an exception for cases like this one.

I would hold that this court does not have jurisdiction over Sears's appeal.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

VERNAL FORBUS; EARL J. BEACHAM; RUDOLPH CADDELL; FRANK R. DAVIS; VERNIE RHODES, JR., Plaintiffs, v. SEARS, ROEBUCK & COMPANY, Defendant.	)	CIVIL ACTION NO. 90-G-1299-S (Filed May 31, 1991)

ORDER

This cause comes before the court on the defendant's motion for partial summary judgment on counts two through six of the above-styled complaint and on the plaintiffs' Fed. R. Civ. P. 54(b) motion for certification of final judgment. Having considered the motion for partial summary judgment, the pleadings, the submissions of counsel, and the applicable law, the court is of the opinion there is no genuine issue of material fact and the defendant is entitled to judgment as a matter of law. Having further noted that there is no opposition to the court's certifying the order granting partial summary judgment the court is of the opinion that motion should be granted. Accordingly, consistent with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the STAY entered May 7, 1991, be and it hereby is LIFTED for the purpose of entering this order and opinion. It is

FURTHER ORDERED, ADJUDGED and DECREED that the defendant's motion for partial summary judgment on counts two through six of the above styled complaint be and it hereby is GRANTED. It is

FURTHER ORDERED, ADJUDGED and DECREED that the plaintiffs' Fed. R. Civ. P. 54(b) motion for certification of final judgment be and it hereby is GRANTED. It is

FURTHER ORDERED, ADJUDGED and DECREED that FINAL JUDGMENT be and it hereby is ENTERED in favor of the defendant on counts two through six of the complaint. It is

FURTHER ORDERED, ADJUDGED and DECREED that this case be and it hereby is STAYED pending appeal.

DONE and ORDERED this 31st day of May 1991.

/s/ J. Foy Guin, Jr.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

VERNAL FORBUS; EARL J. BEACHAM; RUDOLPH CADDELL; FRANK R. DAVIS; VERNIE RHODES, JR., Plaintiffs, v. SEARS, ROEBUCK & COMPANY, Defendant.	)	CIVIL ACTION NO. 90-G-1299-S (Filed May 31, 1991)

MEMORANDUM OPINION

By order and opinion of this date the court grants partial summary judgment to the defendant on counts two through six, common law contract and tort claims, set forth below:

1) count two – fraudulent inducement to enter into releases resulting in the termination of plaintiffs' employment;

2) count three – fraudulent and bad faith breach of the respective plaintiffs' employment contracts;

3) count four – fraudulent inducement to terminate employment;

4) count five – fraudulent suppression of material facts relating to termination of employment; and

5) count six – deceit in connection with termination of employment.

The remaining count, count one, is brought pursuant to the Age Discrimination in Employment Act, as amended, 29 U.S.C.A. § 621 *et seq.* Subject matter jurisdiction is premised upon 28 U.S.C.A. §§ 1331, 1337 and 1343.

Suit is brought by five former full-time employees of Sears, Roebuck & Company [hereinafter Sears] arising out of the termination of their employment in late 1989 in connection with plans for down-sizing the Sears Retail Distribution Center [hereinafter RDC] located in Birmingham, Alabama. Plaintiffs, all over forty years of age, were employed at the RDC in the following capacities: Vernie Rhodes, shipper; Rudolph Caddell, shuttle driver; Frank R. Davis, warehouseman; Earl J. Beacham, truck driver; and Vernal Forbus, shipping manager. When hired each had signed an employment application which reads in pertinent part, as follows:

> In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck and Co., and **my employment and compensation can be terminated, with or without cause and with or without notice, at any time, at the option of either the Company or myself.** I understand that no store manager or representative of Sears, Roebuck and Co., other than the president or vice-president of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing. (Emphasis added).

In an effort to compete and recapture its former share of the retail market Sears began a restructuring program in 1987 to reduce its distribution costs. In April 1989 a nationwide reorganization of its merchandise receipt and delivery services was planned. As part of this plan the Birmingham RDC was slated for conversion to a Home Delivery Center [hereinafter HDC].[1] This conversion mandated a substantial work force reduction. Mr. Neal Owings, the Birmingham RDC manager, along with other managers throughout the country, was authorized to and did offer all employees and supervisors the standard Sears reorganization package [hereinafter RI Package] to encourage voluntary severance. Benefits accompanying acceptance of the RI Package listed in the package booklet included severance pay, early retirement, and extended medical and life insurance coverage. The package acceptance deadline was November 6, 1989.

Seventeen employees, including the five plaintiffs, elected to accept the RI Package, making it unnecessary to terminate any employees involuntarily.[2] Plaintiffs Forbus and Caddell accepted the early retirement package and resigned effective November 10, 1989. Plaintiffs Davis, Rhodes and Beacham, ineligible for retirement,

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[1] The sole function of the Birmingham facility would be to deliver goods directly to customers' homes.

[2] All employees except the home delivery employees were subject to termination had these seventeen not elected voluntary severance. Those not accepting the RI Package gambled that they would not be terminated. Plaintiffs protected their interests by accepting the severance program. Had they been terminated they would not have received the benefits connected with the RI Package.

accepted the severance package. Davis resigned on November 10, 1989. Rhodes and Beacham resigned prior to November 7, 1989.

Six weeks after the RI Package was offered, Sears headquarters began to reconsider its restructuring plans. Discovering that the Memphis facility was unable to service the Birmingham market, the corporate staff suggested that the Birmingham RDC be converted to a Cross Dock Center as well as a Home Delivery Center.[3] This revision would cut the staff reductions originally anticipated.

Final approval of the revision was received on or about January 2, 1990. Mr. Owings announced the decision in Birmingham on January 16, 1990. Soon thereafter plaintiffs Caddell, Forbus, and Davis telephoned Owings requesting their jobs back.[4] Owings informed them there were no openings at that time. When it became apparent in April that another shipper was needed Sears offered Rhodes unconditional reinstatement to his old position. Unconditional reinstatement was offered to Thomas White at the same time. Mr. White accepted the offer and is a current employee. Mr. Rhodes refused reinstatement.

Additional positions for part-time employment became available in May when the Birmingham facility

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[3] Prior to the restructuring announcement the Birmingham RDC performed three distinct delivery functions: (1) warehouse for goods; (2) cross-dock center for merchandise in transit; (3) distribution center for Sears retail stores and customers' homes.

[4] No employees were permitted to rescind their release agreements.

began servicing stores previously serviced by the Pensacola, Florida facility. All employees who had accepted the RI Package in November 1989, including the plaintiffs, were offered reinstatement to part-time positions at their old full-time hourly rate. Only Davis accepted the offer as a part-time shipper.

This court is of the opinion that breach of contract claims should be dismissed. Plaintiffs had no employment contracts. They were, as evidenced by their employment applications, at-will employees who could be discharged at any time for any reason.[5] Courts have consistently upheld the at-will provision of the Sears employment application.

In *Reid v. Sears, Roebuck and Co.*, 790 F.2d 453 (6th Cir. 1986), the court said:

> Every reported district court case involving a claim of unlawful discharge in the face of the language contained in the Sears application has resulted in summary judgment for Sears. *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980); *Summers v. Sears, Roebuck & Co.*, 549 F. Supp. 1157 (E.D. Mich. 1982); *Ringwelski v. Sears, Roebuck & Co.*, ___ F. Supp. ___ (E.D. Mich. Sept. 6, 1985). Further, the Michigan Court of Appeals affirmed summary judgment for Sears in *Eliel v. Sears, Roebuck & Co.*, 387 N.W.2d 842 (Mich. App. 1985). The court found that Eliel's employment was governed by the terms of the application and that none of the subsequent statements by Sears representatives

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[5] The court rejects the plaintiffs' argument that the RI Package was a novation which changed their at-will status.

> relied on by the plaintiff was made by the president or vice president of the company. The Michigan Court of Appeals reached the same conclusion in a case against another employer whose agreement with its employees required an acknowledgment that "my employment and compensation can be terminated, with or without notice at any time at the option of either the Company or myself. . . . " *Ledl v. Quik Pik Stores*, 133 Mich. App. 583, 349 N.W.2d 529 (1984).

790 F.2d at 461.

Federal interpretation of the language of the Sears employment application is consistent with Alabama law. Plaintiffs were hired for an indefinite period of time and could leave or be discharged at any time for any reason. *See Goodwin v. Barry Miller Chevrolet, Inc.*, 543 So. 2d 1171 (Ala. 1989) (Summary judgment was properly entered on the contract claim because the employee was at most an employee at will); *Hickenbottom v. Preferred Risk Mutual Ins.*, 514 So.2d 881 (Ala. 1987) ("Contracts without a fixed term are terminable at the will of either party and may be terminated for any cause or for no cause.") (quoting *Bates v. Jim Walter Resources, Inc.*, 418 So. 2d 903 (Ala. 1982)).

The Alabama Supreme Court upheld language similar to that in the Sears employment application in *Shelby v. Zayre Corp.*, 474 So. 2d 1069 (Ala. 1985). The court granted summary judgment for the department store because "Shelby signed an employment application which specifically stated that employment could be terminated 'with or without cause, and with or without notice, at any time, at the option of either the company or [the employee].' " 474 So. 2d at 1071.

In upholding termination of at-will employees the Alabama Supreme Court has said:

> The general rule is that an employment contract at will may be terminated by either party with or without cause or justification. 56 C.J.S. *Master and Servant* § 31; and 62 A.L.R. 3d 271. This means a good reason, a wrong reason, or no reason.
>
> Alabama has followed the general rule which is that in a contract of employment "at will," the contract means what it says, that it is at the will of either party. The employee can quit at will; the employer can terminate at will. *Alabama Mills, Inc. v. Smith,* 237 Ala. 296, 186 So. 699 (1939). This is true whether the discharge by the employer was malicious or done for other improper reasons. *Commercial v. International Harvester Co.,* 235 Ala. 376, 178 So. 894 (1938). This has been the Alabama law since the early years of this century.

Hinrichs v. Tranquilaire Hospital, 352 So. 2d 1130, 1131 (Ala. 1977). More recent holdings of the court have followed this reasoning. *See Jones v. Ethridge,* 497 So. 2d 1107 (Ala. 1986) (The passage by the legislature of Code 1975, § 12-16-8.1 and § 25-5-11.1 does not change the "general common law rule with respect to the employer's right to fire an at-will employee.")

Consistent with the law set forth the court holds that plaintiffs were at-will employees. Sears did not breach a contract with any or them. Furthermore, the court holds that the fraud counts be rejected. In *Salter v. Alfa Insurance Company, Inc.,* 561 So. 2d 1050 (Ala. 1990), the court upheld the termination of an at-will employee and

rejected the employee's fraud claim. The court held that even if the elements of actionable fraud based on a misrepresentation were present, the fraud claim would fail. The plaintiff suffered no damages. Specifically, the court said:

> Salter had an employment contract which was terminable by Alfa at any time and for any, or no, reason. Even assuming that Salter proved that Alfa, through one of its representatives, had intentionally or recklessly misrepresented to her that she did not have to participate at all in the investigation of the W.B. claim; that she had acted upon that misrepresentation; and that Alfa had based the termination of her contract on her failure to cooperate in the investigation, the fraud claim would still fail. Although we could never sanction the kind of treatment that Salter is alleged to have received from Alfa in this case, Alfa had the right under the employee-at-will doctrine to terminate Salter's contract, even if it did so maliciously or for some other improper reason.

Id. at 1054.

Salter is almost directly on point. As in *Salter*, plaintiffs here are at-will employees. The court is not saying whether or not Sears misrepresented its reorganization plans. While plaintiffs contend Sears knew that it was not going to cut back on its employees at the time the RI Package was presented, there is no evidence to that effect. All the evidence indicates the change in plans occurred after plaintiffs had accepted the offer. Predictions about the future are not fraudulent if they turn out wrong, unless they were made with a present intent to deceive.

See Lankford v. Witmoudt, 528 So. 2d 850, 853 (Ala. 1988) (Fraud claim could not be sustained because there was no evidence defendant had a present intent to deceive, or that he had no intention of carrying out his promises); *Selby v. Quartrol Corp.*, 514 So. 2d 1294, 1297 (Ala. 1987) (When alleged misrepresentations concern future acts the plaintiff must prove "(1) that the defendant intended, at the time of the alleged misrepresentation, not to perform, and (2) that the defendant made the representation with a present intent to deceive.").

While it is true the defendant offered inducements to encourage voluntary terminations, these inducements to resign did not give plaintiffs greater rights than they would have had had they been fired. They suffered no recoverable damages. Without damages the claims of fraud and deceit fail.[6]

Since plaintiffs have suffered no recoverable damages the fraud and deceit claims in counts two through six fail. In order to recover plaintiffs must show they were injured. *Lowe v. American Medical International*, 494 So. 2d 413, 415 (Ala. 1986); *Williams v. Prudential Ins. Co.*, 470 So. 2d 1200, 1202 (Ala. 1985); *National States Insurance Co. v. Jones*, 393 So. 2d 1361, 1363-64 (Ala. 1980); *Old*

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[6] Nor did the inducements to resign form a basis for the claim of mental anguish or distress as claimed in the deceit count. *Slovensky v. Birmingham News Company, Inc.*, 358 So. 2d 474, 477 (Ala. Civ. App. 1978) (Court refused to allow wife damages for mental distress for the alleged wrongful discharge of her husband noting that no recovery had ever been allowed for mental distress arising from the wrongful discharge of an employee in breach of an employment contract).

Southern Life Insurance Co. v. Woodall, 295 Ala. 235, 239-40, 326 So. 2d 726, 729 (1976).

Plaintiffs' claim for breach of an implied covenant of good faith and fair dealing should be dismissed as a matter of law. Alabama courts do not recognize an independent tort action for "bad faith" breach of employment contract. *Hoffman-LaRoche, Inc. v. Campbell*, 512 So. 2d 725, 738 (Ala. 1987) (Obligation of "good faith" arises as part of the contract; its breach does not give rise to an action in tort.); *Harrell v. Reynolds Metals Co.*, 495 So. 2d 1381, 1388 (Ala. 1986) (Court refused to extend to the area of general contract law the tort of bad faith); *Kennedy Elec. Co. v. Moore-Handley, Inc.*, 437 So. 2d 76, 81 (Ala. 1983) (Court refused to extend the tort of bad faith beyond the area of insurance policy cases); *Brown-Marx Associates, Ltd. v. Emigrant Savings Bank*, 527 F. Supp. 277 (N.D. Ala. 1981), *aff'd*, 3 F.2d 1361 (11th Cir. 1983) (The bad faith tort action has not been applied to actions other than insurance contracts).

Although the implied covenant of good faith and fair dealing attaches to every contact [sic] it does not alter contract terms. *Hilley v. Allstate Insurance Company*, 562 So. 2d 184, 190 (Ala. 1990) (Court refused to allow the obligation of good faith and fair dealing to supply a term that added something new or different to the rights and obligations to which the parties have expressly agreed or to vary clear contract terms). Similarly, this court cannot allow the obligations of good faith and fair dealing to alter or vary the terms of the at-will contracts before it. The individual contracts between Sears and the plaintiffs do not violate public policy; hence, there is no reason for the court to interfere.

For the above stated reasons the court grants the motion of the defendant for partial summary judgment. An order consistent with this opinion is being entered contemporaneously herewith.

DONE this 31st day of May 1991.

/s/ J. Foy Guin, Jr.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, VERNIE RHODES, JR.,	)	
Plaintiffs,	)	Civil Action No:
v.	)	CV-90-G-01299 S
SEARS ROEBUCK AND COMPANY,	)	
Defendant.	)	

AMENDED PRE-TRIAL ORDER

A Pre-Trial Conference was held in the above case on December 17, 1990, wherein, or as a result of which, the following proceedings were held and action taken:

1. Appearance. Appearing at the conference were:

William C. Knight, Jr., for Plaintiff
Williams F. Gardner, for Defendant
S. Richard Pincus, for Defendant

2. Jurisdiction and Venue. Subject matter jurisdiction of the plaintiffs' claims arising under the Age Discrimination and Employment Act, exists by virtue of 28 U.S.C. §§1331, 1337 and 1343. Subject matter jurisdiction of the plaintiffs' state law claims exists by virtue of 28 U.S.C. §1332 because of the amount in controversy and diversity of citizenship. Personal jurisdiction and venue are not contested.

3. Consolidation and Joinder. The party plaintiffs and their respective claims are properly joined there being a common nucleus of operative facts relating to the plaintiffs and their respective claims.

4. Parties and Trial Counsel. The parties before the court are correctly named as set out below; and the designed trial counsel for the parties are set out below:

Trial April 29, 1991 or May 6, 1991.

PARTIES	TRIAL COUNSEL
Plaintiffs: Vernal Forbus, Sr., Earl Beacham, Vernie Rhodes, Jr., Rudolph Caddell, Frank Davis	William C. Knight, Jr. (Burr & Forman) J. Patrick Logan (Burr & Forman)
Defendant: Sears, Roebuck & Company	S. Richard Pincus, Joshua D. Holleb, Joel W. Rice (Fox and Grove, Chartered) William F. Gardner, William A. Robinson, R. Taylor Abbot, Jr. (Cabaniss, Johnston, Gardner, Dumas & O'Neal)

5. Pleadings. The following pleadings (with any modifications contained in this Order) have been allowed: The Complaint, filed on behalf of the plaintiffs; the Answer, filed on behalf of the defendant.

6. Statement of Case.

(a) Agreed Summary. This case arises out of certain events which affected plaintiffs' employment status at the

Sears distribution facility located at 33 Omega Street, Birmingham, Alabama.

On or about October 30 and 31, 1989, or within that general time frame, Sears management informed its Omega Street employees of a planned restructuring of the Omega Street operation. Under that restructuring plan, the operation was to be converted to a home delivery center operation. Employees were also advised that, under the restructuring, fewer employees would be needed and staff reductions would occur.

Plaintiffs and all other eligible employees were offered a reorganization incentive package providing severance pay and other benefits for those electing to accept it within a certain prescribed time limit. As a condition for receiving any of the benefits offered under the package, plaintiffs were required to sign a general release and waiver releasing Sears and its successors from any and all causes of action, including the actions brought in the instant case. Each of the plaintiffs executed a release and waiver and thereafter received severance pay and other benefits. Plaintiffs subsequently learned that the announced restructuring did not occur. Some of the plaintiffs then requested their old positions back, and when Sears refused, they brought this action, alleging age discrimination, breach of contract and fraud.

(b) Plaintiffs' Position. The plaintiffs in this action were long-time employees of the defendant who are each more than 40 years of age. Each of the plaintiffs when presented and faced with options available to him under the terms of the defendant's Facilities Closing Program,

relied on representations made by the defendant's representatives regarding the defendant's intentions to close the warehouse and shipping facility on Omega Street by December 31, 1989 and other representations made by the defendant's representatives concerning the effect of choosing the options available to the plaintiffs.

The defendant's warehouse and shipping facility on Omega Street did not, in fact, close on December 31, 1989 as represented by the defendant to the plaintiffs. Moreover, the defendant, through its agents and representatives, made additional representations to the plaintiffs which were false and misleading and upon which the plaintiffs relied. For example, the defendant's agents represented to the plaintiffs that they had "no choice" but to elect certain options available under the plan and that it would "do no good to consult an attorney". The plaintiffs contend that such representations were false and misleading and involuntarily coerced each of them to terminate their employment and accept benefits substantially less than the plaintiffs would be entitled to had they not been coerced and fraudulently induced. Furthermore, the plaintiffs contend that the releases they were required to sign as a condition of "voluntarily" participating in the employer's plan were likewise fraudulently induced and based upon false representations of material fact upon which the plaintiffs relied to their detriment. The plaintiffs further contend that the plaintiffs' relationship with the defendant was one which required the defendant not only to speak the truth, but to disclose all facts which could possibly effect the plaintiffs' election of the options supposedly available to them. Moreover, four of the

plaintiffs (with the exception of Frank Davis), were singled out by the defendant to "voluntarily" elect early retirement because they met the age and service requirements for eligibility for early retirement. The plaintiffs' forced early retirement has caused each of them to suffer substantially because the benefits provided upon early retirement are drastically reduced from the retirement benefits available at normal retirement age.

The plaintiffs contend that their forced early retirement, forced terminations and the involuntary and fraudulently induced releases signed by them constitute a violation of the Age Discrimination and Employment Act. Additionally, the plaintiffs contend that the defendant's actions were wrongful under Alabama law and actionable as breach of contract, breach of the covenant of good faith and fair dealing, fraudulent misrepresentations and suppression of material facts upon which plaintiffs relied to their detriment, and fraudulent inducement.

The plaintiffs have requested a jury trial on all of the claims. The plaintiffs are seeking all remedies available under the ADEA including, but not limited to, back pay, front pay, liquidated damages and retirement benefits calculated on the basis of what the plaintiffs would be entitled to had they been permitted to remain employed until normal retirement age. Under the state law claims, the plaintiffs seek compensatory damages for any and all lost wages, the difference between the benefits received and the benefits the plaintiffs would have received had the defendants acted in good faith, compensatory damages for pain and suffering and emotional distress and

punitive damages commensurate with the jury's determination of the wrongfulness of the defendant's conduct and necessity to deter such conduct in the future.

(c) Defendant's Position.

Plaintiffs were employed by Sears at its Retail Distribution Center ("RDC") in Birmingham, Alabama. The RDC facility was used by Sears to both store and distribute merchandise to various retail outlets and to customer homes. As part of a national reorganization of its distribution operations the RDC in Birmingham was slated to be converted to a Home Delivery Center ("HDC"). An HDC is used exclusively to deliver retail and catalog merchandise to customer's homes. Since a substantial portion of the warehouse function was to be eliminated, Sears management concluded that a substantial reduction in force at the Birmingham facility would be required.

As a result, local management announced to the Birmingham employees the decision to downsize the facility from an RDC to an HDC. The employees were advised that as a result of the restructuring, fewer employees would be needed and staff reductions would occur. In addition, the employees were informed that Sears was offering a generous restructuring incentive package to encourage voluntary severance. That severance package provided the equivalent of two weeks of severance pay for each year of employment, early retirement benefits, and extended medical and life insurance coverage. Employees were also advised that involuntary terminations would occur if an insufficient number of employees elected to accept the severance package and voluntarily sever their employment.

Management met individually with each employee who expressed an interest in the package. Employees were told that in order to qualify for the incentive package, they would be required to sign a General Release and Waiver and work until their job was eliminated. They were also advised, in writing, to consult with an attorney before signing the release. Finally, they were informed that the offer would remain open for a limited period of time and might not be offered again.

Plaintiffs Forbus and Caddell elected to take advantage of the early retirement package and resigned, effective November 7, 1990, after duly executing the applicable release of all claims. Plaintiff Davis, who was not eligible for retirement, resigned on November 7, 1989, took the severance package and executed a release and waiver.

The remaining plaintiffs, Rhodes and Beacham, also selected the severance package, but were asked to stay on until the reorganization was further along. Thereafter, Rhodes voluntarily elected to take his early severance and retirement benefits effective December 31, 1989. Earl Beacham formally severed his employment on January 5, 1991. Beacham and Rhodes also executed a release and waiver before these dates. In exchange for such release and waivers, plaintiffs received severance payments ranging from between $9,728.00 and $16,000.00, which they took either as a lump sum or as a salary continuation.

On or about January 16, 1990, after learning that headquarters' plans for the unit had changed, local management advised the remaining employees that the RDC

would not be reorganized into an HDC. Instead, the facility would become a Cross-Dock Center ("CDC"), which functions solely as a station for merchandise on delivery between points of destination. The CDC, however, still required a reduced work force. This change in restructuring plans, dictated by the Chicago office, was caused by legitimate business conditions not envisioned in the initial nationwide strategy to streamline delivery systems.

Soon after the January 15, 1990 announcement, several of the plaintiffs requested their jobs back. They were advised there were no positions available for them at that time. Since that time, plaintiff Rhodes was offered reinstatement to his old position in April, but he declined. When part-time positions became available in May, the remaining plaintiffs were offered reinstatement to those positions, but only plaintiff Davis accepted. Davis is currently employed at the CDC facility as a part-time shipper.

Sears contends that plaintiffs, by accepting the substantial severance benefits in exchange for a general release and waiver of their rights and thereafter failing to tender those benefits to Sears before filing this action, are completely barred under Alabama law from litigating any of their claims. It is undisputed that each of the plaintiffs have received substantial severance payments; that each signed a general release releasing Sears and its successors from any and all causes of action, including actions under the Age Discrimination in Employment act ("ADEA"), arising as a consequence of their employment or their

termination from employment with Sears; and that plaintiffs have not returned or offered to return such payments, although plaintiffs have long known of the facts underlying their claims of fraud and coercion. Consequently, Sears plans shortly to seek summary judgment. Sears also claims that the state law claims attacking its Severance Allowance Plan are preempted by ERISA's preemption provisions, and based on recent Supreme Court rulings, will seek leave of court to assert this additional affirmative defense in the event Sears' summary judgment motion is denied.

Should the case proceed to trial, Sears contends that the releases executed by plaintiffs constitute a complete defense to all their claims. Sears denies that those releases were coerced or that plaintiffs were induced through fraud to sign them. Sears further contends that, while the plans for the RDC changed after plaintiffs and other accepted the reorganization incentive package and, as a consequence, fewer jobs were eliminated than originally anticipated, this decision was based on legitimate business considerations. Neither the original plan nor the later change were intended or designed to mislead plaintiffs into executing releases or terminating their employment. Sears further contends that, while plaintiffs were told that the unit would be downsized and, if an insufficient number of employees failed to voluntarily resign, employees would be terminated, plaintiffs still had the choice of rejecting the package and taking their chances as did many other employees. Sears contends, therefore, that the releases are valid and were not induced as a result of fraud or coercion.

Regarding plaintiffs' remaining claims, Sears denies that plaintiffs were terminated because of their age in violation of the ADEA or in breach of any employment contract or related rights under Alabama law. Sears contends that plaintiffs were at all times employees at-will and acknowledged that status in their employment applications signed at date of hire. It further denies that plaintiffs were forced to resign or to accept early retirement in violation of ADEA. It also denies plaintiffs were induced to resign or terminate their employment or to sign releases and waivers as a result of any fraudulent misrepresentation, or unlawful suppression of information by Sears in violations of Alabama law.

Sears denies that plaintiffs are entitled to recover any damages in this action. If any liability is found, however, defendant contends that plaintiffs' failure to mitigate damages will require a reduction in any amounts claimed. Specifically, in April, 1990 plaintiff Rhodes' failure to accept an offer of unconditional reinstatement to his former or substantially equivalent position bars him from entitlement to any further or future compensatory damages beyond that date. Similarly, excepting plaintiff Davis who accepted an offer of part-time employment in May, 1990, any back pay due the remaining plaintiffs after May, 1990 must be set off by the amounts they would have earned had they accepted reinstatement offers for part-time employment made in May, 1990. Defendant also contends that any compensatory or liquidated damages owed must be set off by plaintiffs' interim earnings, including Davis' earnings at Sears since his reinstatement. Defendant also denies that any punitive damages are appropriate in the circumstances of this case and that

any such award would be in violation of defendant's federal constitutional rights of due process and equal protection of the law.

7. Discovery and other Pre-Trial Procedures.

(a) The parties are given leave to proceed with discovery and other pre-trial procedures. The parties are given leave to proceed with further discovery provided it is commenced in time to be completed by ___ (at least ___ days prior to trial).

(b) The standard Pre-Trial Procedure specified on Exhibit A hereto are adopted as part of this Order.

(c) Pending discovery motions: Not applicable.

8. Trial. (Jury Case)

When the case is called for trial, the parties shall present to the Court any special questions or topics for voir dire examination of the jury venire; and, to the extent the same can be anticipated, any request for instructions to the jury (including extracts of any statutes on which instructions are requested).

ORDERED this ___ day of ___, 1991, that the above provisions be binding on all parties unless modified by further Order for good cause shown.

UNITED STATES DISTRICT
JUDGE
J. ROY GUIN, JR.